FILE COPY

IN THE

Supreme Court of the United States

October Term, 1959.

No. 28

RAPHAEL KONIGSBERG,

Petitioner,

vs.

THE STATE BAR OF CALIFORNIA and the COMMITTEE OF BAR EXAMINERS OF THE STATE BAR OF CALIFORNIA,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

I.

Questions Presented.

1. Is the denial by the California Supreme Court of the petitioner's application for admission to the Bar on the ground that he refused to disclose his relationship with the Communist Party in the present and recent past consistent with the decision of this Court in *Konigsberg v. State Bar*, 353 U. S. 252?

2. May a writ of certiorari be issued to retry the issue whether Mr. Konigsberg is qualified to practice law in the State of California.

3. Has any substantial federal question been raised regarding the adequacy of the warning given to petitioner that his continued refusal to disclose his relationship with the Communist Party in the present and the recent past

would result in the denial of his application for admission to the Bar?

4. Does the denial by the California Supreme Court of the petitioner's application for admission to the Bar on the ground that he refused to disclose his relationship with the Communist Party in the present and the recent past raise any substantial federal question which has not previously been decided by this Court where the questions which he refused to answer were material to a proper investigation and determination of his qualifications for admission to the California Bar?

II.

Constitutional and Statutory Provisions Considered.

The Fourteenth Amendment provides:

> "* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The basic act governing admission to the bar in the State of California is to be found in the Business and Professions Code of the State of California. The principal sections involved are Sections 6060 and 6064.1. These sections read as follows:

> "Section 6060. QUALIFICATIONS FOR APPLICANTS:
>
> "To be certified to the Supreme Court for admission and a license to practice law, a person who does not comply with section 6062 shall:
>
> (a) Be a citizen of the United States.
>
> (b) Be of the age of at least 21 years.

(c) Be of good moral character.

(d) Have been a bona fide resident of this State for at least three months immediately prior to the date of his final bar examination. . . . ."

"Section 6064.1. ONE ADVOCATING THE OVERTHROW OF GOVERNMENT NOT TO BE ADMITTED:

"No person who advocates the overthrow of the Government of the United States or of this State by force, violence, or other unconstitutional means, shall be certified to the Supreme Court for admission and a license to practice law."

III.

Statement of the Case.

In 1953 the petitioner, Raphael Konigsberg, applied for admission to the Bar of the State of California. Thereafter hearings were conducted by the Southern Subcommittee of the Committee of Bar Examiners and by the full Committee to determine whether petitioner could be certified to the California Supreme Court as qualified for admission.

At these hearings, petitioner presented evidence of his qualifications. He was confronted with testimony that he was once a member of the Communist Party and with other evidence which raised doubts in the mind of the Subcommittee and the Committee whether they could properly certify him for admission. He was asked, but consistently refused to answer, whether he was, or had been, a member of the Communist Party of the United States.

The Committee determined that the petitioner had not sustained the burden of proof that he was possessed of a good moral character and that he did not advocate the possible overthrow of the government.

The Supreme Court of California refused to review this determination, with three Judges voting for a hearing.

On certiorari, this Court found that there was insufficient evidence in the record rationally to support a determination that petitioner lacked good moral character or advocated the violent overthrow of the government. The right of the State to exclude Mr. Konigsberg from practice because he refused to divulge information regarding his background to those charged with investigating his qualifications, after due warning of the possible consequences of his refusal, was expressly left open by the decision of this Court.

After remand, the Supreme Court of California referred the matter to the Bar Examiners for further investigation and evaluation. Pursuant to the order of that Court, the Committee conducted a further hearing on September 21, 1957.

At this hearing, the petitioner was advised that it was the statutory duty of the Committee to conduct a thorough inquiry into his eligibility for admission to the Bar and that it was his duty to be completely candid and frank with the Committee. He was exhaustively warned, both before and after his examination, of the possible detrimental consequences to a favorable consideration of his application which would ensue from his refusal to answer questions relating to his membership in the Communist Party:

> "I have generally outlined to Mr. Mosk the scope of the proposed hearing today. I should like to point out to Mr. Konigsberg, as well as to Mr. Mosk, that the functions of the Committee of Bar Examiners are really two-fold: First to investigate in connection with the requirements for admission to practice set

forth in the Business and Professions Code; and second to make determinations. *As a result of our two-fold purpose, particularly our function of investigation, we believe it will be necessary for you, Mr. Konigsberg, to answer our material questions or our investigation will be obstructed. We would not then as a result be able to certify you for admission.* If you have questions we shall certainly be happy to have your counsel or you address them to us. We should certainly make every effort to limit our questions to those which are material ones.

* * * * * * * *

"Mr. Konigsberg, as indicated at the beginning of this proceeding, the Committee is really charged with two functions, one to investigate, and one to determine. Your counsel has asked the Committee, asked me, for an indication as to the scope and purpose of this hearing. I indicated to him what the scope and purpose is, and as a result you are aware of it. We are engaged in the function of investigating matters which we are charged with the responsibility of determining under the law of the State of California. We have every intention and desire of carrying out that investigative duty consistent with the constitutional protections and freedoms that the United States and the California constitutions provide. We still have an obligation to investigate. I believe that we are charged with this responsibility as it might apply to your application for admission. That investigation can be carried out in a number of ways. In connection with determining whether or not you meet the minimum standards to practice law as far as the knowledge of the subject of law is concerned, we have asked you questions in an examination, and

you have given us answers. In connection with other requirements for admission to practice, as set forth in the Business and Professions Code of California, we have asked you to fill out an application, which you have done. Also as part of our investigation and your satisfying each and all of these requirements to practice law we have called you before the Committee. We have asked questions of you. We are merely now engaging in that investigation which we have engaged in by having hearings, by having you fill out applications, and by asking you to take an examination before. Now, this is part of that same function. * * *

* * * * * * * *

"Mr. Konigsberg, I think you will recall that I initially advised you a failure to answer our material questions would obstruct our investigation and result in our failure to certify you. With this in mind do you wish to answer any of the questions which you heretofore up to now have refused to answer?" (Emphasis added.) [Sept. Rec. pp. 4, 32, 39.][1]

The Committee also explained to the petitioner the pertinency of questions regarding his membership in the Communist Party to its inquiry into his qualifications for admission to the Bar.

"If you answered the question, for example, that you had been a member of the Communist Party during some period since 1951 or that you were presently a member of the Communist Party, the

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[1]The transcript of the hearing of September 21, 1957, will be cited as "Sept. Rec." and in conformity with the designation employed in the petitioner's brief.

Committee would then be in a position to ask you what acts you engaged in to carry out the functions and purposes of that party, what the aims and purposes of the party were, to your knowledge, and questions of that type. You see by failing to answer the initial question there certainly is no basis and no opportunity for us to investigate with respect to the other matters to which the initial question might very well be considered preliminary.

* * * * * * * *

"Mr. Mosk, you realize that if Mr. Konigsberg had answered the question that he refused to answer, an entirely new area of investigation might be opened up, and this Committee might be able to ascertain from Mr. Konigsberg that perhaps he is now and for many years past has been an active member of the Communist Party and from finding out who his associates were in that enterprise we might discover that he does advocate the overthrow of this government by force and violence. I am not saying that he would do that, but it is a possibility, and we don't have to take any witness' testimony as precluding us from trying to discover if he is telling the truth. * * *" [Sept. Rec. pp. 42, 46-47.]

Nevertheless, petitioner refused to divulge whether he has been a member of the Communist Party at any time since 1951, *or whether he is presently a member of such party* [Sept. Rec. pp. 34-35.] In each instance, the petitioner predicated his refusal to answer upon his rights under the First Amendment and Article I, Section 1, of the California Constitution. [Sept. Rec. pp. 34-35, lines 25-26, 1-2.]

The full sweep of Mr. Konigsberg's ideas regarding the permissible limits of an inquiry by those charged with examining the qualifications of applicants for admission to the Bar is revealed by his comments at the hearing.

"CHAIRMAN WHITMORE: How can we make a determination with respect to the nature of your activities with the Communist Party if you were, assuming you were, a member if we have no basis for questioning you concerning them? You won't answer our question as to whether or not you were ever a member. That question in that respect would be a preliminary question, would it not?

A. You have asked me if I advocate the overthrow of the government, if I committed any illegal acts. I answered gladly. I never have, I don't now, and I never will. I am incapable of doing it.

MR. O'DONNELL: Suppose we don't believe you, don't you think we are entitled to ask you as to your association with the Communist Party and your membership with the Communist Party as part of our examination?

A. *You are entitled to ask me only with respect to phases of illegal activity. You cannot ask me or any citizen about his activities that are legal, that are protected under the First Amendment, under the part of normal civic activity.* * * *" (Emphasis added.) [Sept. Rec. pp. 41-42.]

In other words, the substance of Mr. Konigsberg's position is: You may ask me if I have committed any crime in general or if I have committed a specific crime. However, you may not make any inquiry regarding activity which is not *per se* illegal. If I do not admit to criminal activity, or if you cannot prove such activity on

my part, I am entitled to admission to the Bar although I have refused to reveal to you important areas of my background.

The Committee made the following findings in its report to the Supreme Court of California:

"(1) That the questions put to the applicant by the Committee concerning past or present membership or affiliation with the Communist Party are material to a proper and complete investigation of his qualifications for admission to practice law in the State of California.

(2) That the refusal of applicant to answer said questions has obstructed a proper and complete investigation of applicant's qualifications for admission to practice law in the State of California.

(3) That the refusal of applicant to answer said questions has obstructed a necessary and proper function of the Committee under Section 6046 and related sections of the Business & Professions Code of the State of California and under the Rules Regulating Admission to Practice Law in California adopted pursuant to Section 6047 and related sections of said Code.

(4) That in view of the foregoing, the Committee is unable to certify that applicant possesses the requisite qualifications or has fulfilled the requirements for admission to practice law in the State of California."

The Supreme Court of California reviewed the entire record, adopted the findings of the Committee and refused to admit the petitioner to the practice of law.

Konigsberg v. State Bar (1959), ... Cal. 2d .....,
52 A. C. 799, 344 P. 2d 777.

IV.

Reasons Why Certiorari Should Not Be Granted.

A. The Denial of Mr. Konigsberg's Application for Admission to the California Bar by the California Supreme Court Is Completely Consistent With the Decision of the United States Supreme Court in Konigsberg v. State Bar, 353 U. S. 252.

A single issue on the merits was previously decided:

> "We now pass to the issue which we believe is presented in this case: Does the evidence in the record support any reasonable doubts about Konigsberg's good character or his loyalty to the Governments of State and Nation?"
>
> *Konigsberg v. State Bar,* 353 U. S. 252, 262.

The question whether Mr. Konigsberg could be denied admission to the State Bar of California solely by reason of his refusal to answer questions which were relevant and material to a determination of his eligibility for admission to practice was determined not to be before this Court and was not passed on by it:

> "He was not denied admission to the California Bar simply because he refused to answer questions.
>
> "In Konigsberg's petition for review to the State Supreme Court there is no suggestion that the Committee had excluded him merely for failing to respond to its inquiries. Nor did the Committee in its answer indicate that this was the basis for its action.
>
> * * * * * * * *
>
> "If it were possible for us to say that the Board had barred Konigsberg solely because of his refusal to respond to its inquiries into his political associa-

tions and his opinions about matters of public interest, then we would be compelled to decide far-reaching and complex questions relating to freedom of speech, press and assembly. There is no justification for our straining to reach these difficult problems when the Board itself has not seen fit, at any time, to base its exclusion of Konigsberg on his failure to answer. If and when a State makes failure to answer a question an independent ground for exclusion from the Bar, then this Court, as the cases arise, will have to determine whether the exclusion is constitutionally permissible. *We do not mean to intimate any view on that problem here nor do we mean to approve or disapprove Konigsberg's refusal to answer the particular questions asked him.*" (Emphasis added.)[1]

Konigsberg v. State Bar, 353 U. S. 252, 261, 262.

This Court then held that the evidence in the record did not justify a determination that Mr. Konigsberg was not a man of good moral character or that he advocated the violent overthrow of the government. The judgment of the California Supreme Court was thereupon reversed and the case "remanded for further proceedings not inconsistent with this opinion." (*Konigsberg v. State Bar*, 353 U. S. 252, 274.)

The language used indicated, and we submit that it was the intention of this Court, that the case should be returned to the jurisdiction of the State of California for

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[1] This Court has reaffirmed in its subsequent decisions of *Beilan v. Board of Education* (1958), 357 U. S. 399, 402, and *Lerner v. Casey* (1958), 357 U. S. 468, 478, that it did not intend to and did not pass on these questions.

such further proceedings as were necessary and proper under the State law to determine whether Mr. Konigsberg should be admitted to the California Bar.

The Supreme Court of California ordered the matter referred to the Committee of Bar Examiners for further proceedings in the light of the opinion of this Court. Pursuant to this order, the Committee conducted a hearing and issued its Report to the Supreme Court of California. Said report is attached as Exhibit A. As set forth in more detail in said Report, the Committee determined, without dissent, that Mr. Konigsberg's refusal to answer material questions had obstructed a proper and complete investigation of his qualifications for admission to practice law in the State of California and that it was therefore unable to certify him for admission to practice.

The California Supreme Court determined that petitioner could and should be denied admission to the California Bar on this ground. Justice Traynor, one of the two dissenting judges, agreed that Mr. Konigsberg could properly be denied admission on this ground and differed only on the question whether such action should be taken:

> "The United States Supreme Court reversed the judgment of this court and remanded the case 'for further proceedings not inconsistent with this opinion.' (353 U. S. at 274.) In view of the questions expressly left undecided and the court's remand, it is my opinion that this court is not foreclosed by the United States Supreme Court's decision in this case from adopting and applying to Konigsberg a rule making failure to answer relevant questions with

respect to his qualifications an independent ground for exclusion."

Konigsberg v. State Bar (1959); ..... Cal. 2d ....., 52 A. C. 799, 805, 344 P. 2d 777, 781. (Opinion of Traynor, J.)

We respectfully submit that:

(1) It was not the intention of this Court to foreclose further proceedings, but rather to remand for such further proceedings and decision as were appropriate under the law and procedures of the State of California; and

(2) The action taken by the Committee of Bar Examiners and the State Supreme Court are entirely consistent with the order of this Court.

B. It Is the Duty of the Committee of Bar Examiners and the Supreme Court of the State of California to Determine Whether an Applicant Is Qualified to Practice Law Within the State. Petitioner Is Not Entitled to a Writ of Certiorari Merely to Re-try the Issue of His Qualifications.

"To be certified to the Supreme Court for admission and a license to practice law, a person who does not comply with section 6062, shall:

"(a) Be a citizen of the United States.

"(b) Be of the age of at least 21 years.

"(c) Be of good moral character.

"(d) Have been a bona fide resident of this State for at least three months immediately prior to the date of his final bar examination. . . ."

Calif. Bus. & Prof. Code, § 6060.

"* * * No person who advocates the overthrow of the Government of the United States or of this State by force, violence, or other unconstitutional means, shall be certified to the Supreme Court for admission and a license to practice law."

Calif. Bus. & Prof. Code, § 6064.1.

Under California law, the California Supreme Court is entrusted with the ultimate determination of whether an applicant is qualified for admission to the Bar.

In re Lavine (1935), 2 Cal. 2d 324, 327-328, 41 P. 2d 161, 162.

In re Hallinan (1954), 43 Cal. 2d 243, 253-254, 272 P. 2d 768, 775.

At the prior hearing before this Court, there was no written opinion of the California Supreme Court to serve as a guide to the California law and to the action taken. Since the reversal by this Court there has been a new hearing by the Committee of Bar Examiners and the California Supreme Court has reviewed the entire record and has heard the arguments of the parties. It has determined that under California law:

(1) Section 6064.1 of the California Business and Professions Code requires the Committee to inquire whether or not an applicant advocates the forcible overthrow of the government.

(2) An applicant who obstructs a proper inquiry into his qualifications by refusing to answer material questions can and should be denied admission to the California Bar.

(3) The questions asked Mr. Konigsberg were relevant, material and necessary to a proper determination of his qualifications.

(4) Mr. Konigsberg blocked a proper inquiry into and determination of his qualifications by refusing to answer these questions and therefore should not be admitted to the California Bar.

In requesting certiorari petitioner quotes a comment in the previous majority opinion of this Court indicating a view that a man of petitioner's background and character should be admitted to the Bar (Pet. Br. p. 12) and otherwise argues at length that he possesses traits which he feels would make him a desirable member of the Bar (Pet. Br. pp. 7, 8, 20).

If we were dealing with the question whether petitioner should be admitted to practice law in the Federal Courts, this line of argument would be proper; but this is not the question before us. We are dealing solely with his admission to practice before the courts of the State of California. We fully recognize that this area of state action is not exempt from federal constitutional limitations. Nevertheless it is a vital area of state responsibility into which this Court should be especially reluctant and slow to enter. There are few principles on which this Court should be more unanimous than on refusing its jurisdiction to re-try the qualifications of an applicant for admission to a State Bar.

Theard v. United States (1957), 354 U. S. 278, 281.

Re Summers (1945), 325 U. S. 561.

C. The Refusal of the Supreme Court of the State of California to Admit to the Practice of Law an Applicant Who Prevents Determination of His Qualifications by Refusing to Disclose the Nature and Extent of His Association With the Communist Party in the Present and Recent Past Does Not Present Any Substantial Federal Question Not Previously Decided by This Court.

The decision of the California Supreme Court determines that an applicant will not be admitted to the Bar of the State of California if he obstructs an inquiry into his fitness by refusing to answer material questions, in this case, the questions relating to membership in the Communist Party from 1951 up to and including September 21, 1957, the date of the Committee hearing:

> "Here it is the refusal to answer material questions which is the basis for denial of certification. Petitioner's refusal to answer is conceded. The issue is whether the questions are material. We think their materiality is clear. The committee is enjoined against certifying for admission to practice any person who 'advocates the overthrow of the Government of the United States or of this State by force, violence, or other unconstitutional means.' (Bus. & Prof. Code, §6064.1). This provision clearly requires the committee to inquire as to such advocacy. The Congress (68 Stat. 775; 50 U. S. C. A. §841) and the California Legislature (Gov. Code, §1027.5) have declared that the Communist Party does advocate such overthrow. It follows that inquiry as to membership in that party is relevant and material in determining whether the proscribed advocacy exists. Petitioner refused to answer questions as to such membership at periods after the statutory proscription and after the legislative declarations of the pur-

pose of the Communist Party. As we have noted, he persisted in his refusal after being warned that such conduct would be deemed to require denial of his certification by the committee."

Konigsberg v. State Bar (1959), ... Cal. 2d ...., 52 A. C. 799, 802, 803; 344 P. 2d 777, 779.

At its previous hearing this Court indicated that if Mr. Konigsberg were barred solely because of his refusal to respond to inquiries of the Committee concerning matters such as his political associations without his first being explicitly warned that he would be barred for refusal to answer, serious questions of elemental fairness would be raised. This Court further indicated that a denial of admission on such a ground might present serious questions relating to the constitutional limitations upon interference with freedom of speech. (*Konigsberg v. State Bar*, 353 U. S. 252, 261.)

However, in the light of subsequent events and decisions no such questions are raised here.

(1) Petitioner Was Explicitly Warned of the Consequences of His Refusal to Answer.

Petitioner was clearly and unequivocally warned by the Committee of Bar Examiners that failure to answer the Committee's questions blocked their inquiry and would prevent his certification.

"* * * As a result of our two-fold purpose, particularly our function of investigation, we believe it will be necessary for you, Mr. Konigsberg, to answer our material questions or our investigation will be obstructed. We would not then as a result be able to certify you for admission. * * *"

[Sept. Rec. p. 4; see also pp. 32, 39.]

Moreover, he was advised in detail of why these inquiries were considered necessary and why his refusal to answer would prevent his certification.

> "If you answered the question, for example, that you had been a member of the Communist Party during some period since 1951 or that you were presently a member of the Communist Party, the Committee would then be in a position to ask you what acts you engaged in to carry out the functions and purposes of that party, what the aims and purposes of the party were, to your knowledge, and questions of that type. You see by failing to answer the initial question there certainly is no basis and no opportunity for us to investigate with respect to the other matters to which the initial question might very well be considered preliminary."
>
> [Sept. Rec. pp. 42-43; see also pp. 46, 47.]

In *Beilan v. Board of Public Education* (1958), 357 U. S. 399, the dismissed schoolteacher contended that he was not sufficiently warned. This argument was rejected:

> "Petitioner complains that he was denied due process because he was not sufficiently warned of the consequences of his refusal to answer his Superintendent. The record, however, shows that the Superintendent, in his second interview, specifically warned petitioner that his refusal to answer 'was a very serious and a very important matter and that failure to answer the questions might lead to his dismissal.' That was sufficient warning to petitioner that his refusal to answer might jeopardize his employment."
>
> *Beilan v. Board of Public Education*, 357 U. S. 399, 408.

Under no stretch of the imagination could the warning in the present case be said to be less explicit than that in the *Beilan* case. There can be no question that petitioner was fully and adequately warned and that lack of warning is not a factor in the present case.

(2) Decisions of This Court Since Konigsberg v. State Bar, 353 U. S. 252, Have Obviated the Existence of Any Substantial Question Relating to Interference With Petitioner's Right to the Freedom of His Speech.

In view of the many determinations which have been made as to the nature of the Communist Party and its activities during the period in issue, we do not feel that the questions asked can properly be categorized as referring to petitioner's "political" affiliations.

> "On these premises, this Court in its constitutional adjudications has consistently refused to view the Communist Party as an ordinary political party, and has upheld federal legislation aimed at the Communist problem which in a different context would certainly have raised constitutional issues of the gravest character. [Citations] On the same premises this Court has upheld under the Fourteenth Amendment state legislation requiring those occupying or seeking public office to disclaim knowing membership in any organization advocating overthrow of the Government by force and violence, which legislation none can avoid seeing was aimed at membership in the Communist Party. [Citations] * * * To suggest that because the Communist Party may also sponsor peaceable political reforms the constitutional issues before us should now be judged as if that Party

were just an ordinary political party from the standpoint of national security, is to ask this Court to blind itself to world affairs which have determined the whole course of our national policy since the close of World War II, affairs to which Judge Learned Hand gave vivid expression in his opinion in United States v. Dennis (CA2 NY) 183 F. 2d 201, 213, and to the vast burdens which these conditions have entailed for the entire Nation.

* * * * * * * * *

"* * * An investigation of advocacy of or preparation for overthrow certainly embraces the right to identify a witness as a member of the Communist Party . . . and to inquire into the various manifestations of the Party's tenets."

Barenblatt v. United States, 360 U. S. 109, 128-129.

Both the Congress and the California Legislature have designated the Communist Party as an instrumentality of a conspiracy to forcibly overthrow the United States Government.

68 Stat. 775, 50 U. S. C. §841 (Supp. 1954).

Calif. Govt. Code §1027.5 (1953).

But, however these questions are categorized, it is clear from the record that they were not asked as idle inquiries into petitioner's political affiliations. The Committee of Bar Examiners determined and the California Supreme Court affirmed them to be both relevant and material to a proper and necessary area of inquiry in determining

petitioner's fitness to practice law.[1] Any question which might have previously existed as to the propriety of denying an applicant admission who fails to answer these questions has been removed by the recent decisions of this Court.

In *Beilan v. Board of Public Education* (1958) *supra*, 357 U. S. 399, this Court upheld the discharge of a public schoolteacher for failing to answer questions by his Supervisor relating to his association with the Communist Party with the following comment directly applicable to the present situation:

> "* * * In the Konigsberg Case, supra, (353 U. S. at 259-261), this Court stresses the fact that the action of the State was not based on the mere refusal to answer relevant questions—rather, it was based on inferences impermissibly drawn from the refusal. In the instant case, no inferences at all were drawn from petitioner's refusal to answer."
>
> *Beilan v. Board of Public Education*, 357 U. S. 399, 409.

In *Lerner v. Casey* (1958), 357 U. S. 468, this Court similarly upheld the discharge of a subway conductor in the New York City Transit System for refusing to answer to those charged with administering the New York

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[1] These questions would be proper were there no other evidence in the record raising doubts in this area. These questions were particularly pertinent here where other evidence properly raised doubts in the minds of the Committee and drew attention to the necessity of an investigation in this area. (See pp. 42 *et seq.*, 154-155, 162-163, 213 *et seq.*, and 246 of the record before this Court in *Konigsberg v. The State Bar of California*, October Term, 1956, No. 5.)

Security Risk Law whether he was then a member of the Communist Party.

On page 16 of his brief, the petitioner attempts to distinguish the *Beilan* and *Lerner* cases on the ground that they involved dismissals resulting from assertion of the privilege against self-incrimination under the Fifth Amendment. With regard to the *Beilan* case, this assertion is incorrect. Mr. Beilan did assert the Fifth Amendment in response to questions by a congressional investigating committee. But, he was discharged because he refused to answer questions posed by his Superintendent on the ground that they related to his "political" beliefs. This, of course, is substantially the identical position taken by the petitioner before the Committee of Bar Examiners. Furthermore, the position is untenable that one who asserts a privilege under the Fifth Amendment is in a different position from one who asserts a privilege under any other portion of the Constitution. (See, *Slochower v. Board of Higher Education*, 350 U. S. 551, 557-558.) It may also be mentioned that the decision of this Court in *Lerner v. Casey* was in no way predicated upon adverse inferences drawn from assertion of the Fifth Amendment privilege.

If anything, the action taken in the *Beilan* and *Lerner* cases goes beyond that taken here. In each of those cases, the petitioner was being removed from an employment which he had held for many years rather than being denied entry to a new employment. More importantly, there can be no question that the concern of the State of California in setting standards for admission to its Bar is fully as great as that of the City of Philadelphia in selecting its schoolteachers and that of New York in selecting its subway conductors. An attorney becomes an

officer of the court, but, even apart from this, he occupies a position of trust and confidence unique among the professions. The recent comment of Mr. Justice Stewart in another context in a suspension and disbarment case is apropos to the present situation:

> "A lawyer belongs to a profession with inherited standards of propriety and honor, which experience has shown necessary in a calling dedicated to the accomplishment of justice. He who would follow that calling must conform to those standards."
>
> *Re Sawyer*, 360 U. S. 622, 646-647.

While the above cases are most closely in point, it may be added that this Court has applied even more serious sanctions for refusal to answer questions of the type asked. In *Barenblatt v. United States* (1959) *supra*, 360 U. S. 109, and *Uphaus v. Wyman* (1959), 360 U. S. 72, this Court sustained criminal sanctions against witnesses who refused to answer similar questions asked by an investigating committee of the United States Congress and the Attorney General of New Hampshire on behalf of the legislature of that state. The purpose of these inquiries was no more vital than that of the State of California in the present case.

One final comment is appropriate. Petitioner's brief contains suggestions that the State Bar has singled him out to block his admission by any means. (See, for example, petitioner's brief, page 12, footnote 3, pages 4, 5.) We accept these assertions as those of an advocate. We feel, however, that a study of the complete record leaves no doubt that the Committee of Bar Examiners has treated Mr. Konigsberg with complete fairness at all times. Moreover, it is appropriate to call attention to

the action of the Committee of Bar Examiners and the California Supreme Court in the case of *Buhai v. Committee of Bar Examiners*, L. A. 24339, Bar Misc. Dkt. No. 2412. Miss Buhai admitted active membership in the Communist Party through 1947, and dues-paying membership through 1953, but, like Mr. Konigsberg, refused to reveal certain details regarding her specific activities and associations in the party. Accordingly, she was denied certification by the Committee and she petitioned the California Supreme Court for admission. While her petition was pending, she voluntarily appeared before the Committee and responded to inquiries concerning the circumstances of her termination of her membership in and disassociation from the Communist Party and the names of certain persons to whom she had communicated such termination and disassociation. On the basis of her further testimony and its own investigation, the Committee determined that Miss Buhai was entitled to certification notwithstanding her previous association with the Communist Party. She was admitted to the practice of law by the California Supreme Court on December 4, 1957. The Report of the Committee of Bar Examiners to the California Supreme Court in the *Buhai* case is set forth in the Appendix as Exhibit B.

In *Re George Anastaplo* (1955), 348 U. S. 946, reh. den. 349 U. S. 908, an applicant for admission to the Illinois Bar presented essentially the same issues now involved in this case to this Court and requested a writ of certiorari. It was denied for lack of a substantial federal question. Since that time, cases such as *Beilan v. Board of Public Education* (1958), 357 U. S. 399, *Lerner v. Casey* (1958), 357 U. S. 468, and *Barenblatt v. United States* (1959), 360 U. S. 109, have been decided

resolving the one substantial federal question which could conceivably be presented in the present case. We therefore submit that there is even less basis than in the *Anastaplo* case to issue a writ of certiorari here.

Respectfully submitted,

FRANK B. BELCHER,

Attorney for Respondents.

RALPH E. LEWIS,

ROBERT D. BURCH,

Of Counsel.

EXHIBIT "A".

L. A. No. 23266.

In the Supreme Court of the State of California.

Raphael Konigsberg, Petitioner, vs. State Bar of California and the Committee of Bar Examiners of the State Bar of California, Respondents.

Report of the Committee of Bar Examiners.

To the Honorable Phil S. Gibson, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the State of California:

I.

On July 10, 1957, the following order was made in the above entitled matter:

"Pursuant to mandate of the Supreme Court of the United States, it is ordered that the decision of this Court, filed April 20, 1955, be vacated, and the matter of admitting Raphael Konigsberg to the practice of law in all the courts of this State is referred to the Committee of Bar Examiners for further proceedings.

"CARTER, J. is of the opinion that the application of Raphael Konigsberg for admission to practice law in all of the courts of this State should now be granted.

(S) GIBSON, Chief Justice."

II.

Pursuant to this order, the following action was taken by the Committee of Bar Examiners in the matter of the application of Raphael Konigsberg for admission to practice law in the State of California:

(1) The Committee carefully considered the opinion of the Supreme Court of the United States in the matter

entitled "Raphael Konigsberg, Petitioner, vs. State Bar of California and Committee of Bar Examiners of the State Bar of California", decided May 6, 1957, 353 U. S. ....., 1 L. Ed. 2d 810, 77 S. Ct. .....

(2) On September 21, 1957, at a meeting of the Committee in Los Angeles, at which all of the members of the Committee were present, the applicant appeared with his attorney, Edward Mosk, Esq. At this meeting the applicant's petition for admission was further heard by the Committee. An argument by the attorney for the applicant in support of the application for admission was also heard. The applicant was sworn and testified at the hearing. A witness produced by the applicant was sworn and testified. Written evidence was offered by the applicant, and was received by the Committee. The written record of all previous hearings by the Committee and one of its subcommittees on the application of Raphael Konigsberg for admission was incorporated as part of the record of the further hearing, by the stipulation of the applicant and by the Committee.

(3) The application was then submitted by the applicant and by his attorney.

III.

At the hearing on September 21, 1957, the Committee advised the applicant and his attorney that the refusal of applicant to answer material questions put to him by the Committee would obstruct the investigation by the Committee of applicant's qualifications for admission to practice law, with the result that the Committee would not be able to certify him for admission.

IV.

At the hearing on September 21, 1957, applicant refused to answer any questions put to him by the Committee concerning his past or present membership in or affiliation with the Communist Party.

V.

After further consideration of the entire record before it, the Committee finds and concludes:

(1) That the questions put to the applicant by the Committee concerning past or present membership in or affiliation with the Communist Party are material to a proper and complete investigation of his qualifications for admission to practice law in the State of California.

(2) That the refusal of applicant to answer said questions has obstructed a proper and complete investigation of applicant's qualifications for admission to practice law in the State of California.

(3) That the refusal of applicant to answer said questions has obstructed a necessary and proper function of the Committee under Section 6046 and related sections of the Business & Professions Code of the State of California and under the Rules Regulating Admission to Practice Law in California adopted pursuant to Section 6047 and related sections of said Code.

(4) That in view of the foregoing, the Committee is unable to certify that applicant possesses the requisite qualifications or has fulfilled the requirements for admission to practice law in the State of California.

In Witness Whereof, the Committee of Bar Examiners of the State Bar of California respectfully submits this report of its proceedings on the reference made to it.

by the Supreme Court of the State of California on July 10, 1957, together with the transcript of the hearing before the Committee on September 21, 1957, and the exhibits submitted by the applicant at that hearing.

Dated: November 9, 1957.

SHARP WHITMORE,
VINCENT H. O'DONNELL,
GEORGE HARNAGEL, JR.
FORREST E. MACOMBER,
GERALD P. MARTIN,
THOMAS H. MC GOVERN,
JOHN B. SURR,
The Committee of Bar Examiners of the State Bar of California,
By SHARP WHITMORE,
Chairman.

EXHIBIT "B".

L. A. No. 24339.

In the Supreme Court of the State of California.

Harriett Buhai, Petitioner vs. State Bar of California and the Committee of Bar Examiners of the State Bar of California, Respondents.

Report of the Committee of Bar Examiners.

To the Honorable Phil S. Gibson, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the State of California:

I.

On August 13, 1957, the following order was made in the above entitled matter:

"The above-entitled matter is referred to the Committee of Bar Examiners for further proceedings.

(S) GIBSON, Chief Justice."

II.

Pursuant to this order, the following action was taken by the Committee of Bar Examiners in the matter of the application of Harriett Buhai for admission to practice law in the State of California:

(1) On September 21, 1957, at a meeting of the Committee in Los Angeles, at which all of the members of the Committee were present, the applicant appeared with her counsel, Stanley Fleishman, Esq., Clore Warne, Esq., and Harvey Grossman, Esq. At this meeting the applicant's petition for admission was again heard by the Committee. An argument by counsel for the applicant in support of the application for admission was also heard. The applicant was sworn and testified at the hearing. Two witnesses produced by the applicant were sworn and testified. The written record of all previous hearings by the Committee and one of its subcommittees on the appli-

cation of Harriett Buhai for admission was incorporated as part of the record of the further hearing, by the stipulation of the applicant and by the Committee.

(2) The application was then submitted by the applicant and by her counsel.

III.

At the hearing on September 21, 1957, the Committee advised the applicant that her refusal to answer material questions put to her by the Committee would obstruct the investigation by the Committee of applicant's qualifications for admission to practice law, and the Committee would not be able to certify her for admission.

IV.

At the hearing on September 21, 1957, applicant answered questions concerning the circumstances of her termination of membership in and disassociation from the Communist Party and the names of certain persons to whom she had communicated such termination and disassociation, the applicant at previous hearings having refused to divulge any of such names.

V.

On the basis of the additional testimony at the hearing on September 21, 1957, a further investigation was conduced by the Committee of Bar Examiners. This further investigation disclosed no facts inconsistent with the testimony of the applicant.

VI.

On the basis of the additional testimony given by the applicant at the hearing on September 21, 1957, and on the basis of the further investigation thereafter conducted by the Committee, the Committee at a meeting held on October 6, 1957, found that applicant possessed the requisite qualifications and had fulfilled the requirements for admission to practice law in the State of California

and voted to certify applicant to the Supreme Court of the State of California for such admission.

VII.

On October 18, 1957, George Harnagel, Jr., Esq., a member of the Committee of Bar Examiners and acting for the Committee, certified to the Supreme Court that Harriett Buhai had fulfilled the requirements for admission to practice law in the State of California, and moved that she be admitted at an attorney at law in all the courts of the State of California.

VIII.

The Supreme Court deferred action on the motion to admit Harriett Buhai to the practice of law in this State, and directed that a report be filed by the Committee of Bar Examiners with the Court.

In Witness Whereof, the Committee of Bar Examiners of the State Bar of California respectfully submits this report of its proceedings on the reference made to it by the Supreme Court of the State of California on August 13, 1957, together with the transcript of the hearing before the Committee on September 21, 1957.

Dated: November 9, 1957.

SHARP WHITMORE,
VINCENT H. O'DONNELL,
GEORGE HARNAGEL, JR.
FORREST E. MACOMBER,
GERALD P. MARTIN,
THOMAS H. MC GOVERN;
JOHN B. SURR.
The Committee of Bar Examiners of the State Bar of California.
By SHARP WHITMORE,
Chairman.

PETITIONER'S OPENING BRIEF

SUBJECT INDEX

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IN THE

Supreme Court of the United States

October Term, 1960

No. 28

RAPHAEL KONIGSBERG,

Petitioner,

vs.

STATE BAR OF CALIFORNIA AND THE COMMITTEE OF BAR EXAMINERS OF THE STATE OF CALIFORNIA,

PETITIONER'S OPENING BRIEF.

I.

Prior Opinions.

The controlling court opinion in this proceeding is the opinion and judgment of this court in *Konigsberg v. State Bar*, 353 U. S. 252 (1957).

The only written opinion below is the decision of the Supreme Court of the State of California in L.A. 23266, on October 16, 1959. The majority opinion by the Court in bank is found as Exhibit "C" attached to the Petition for a Writ of Certiorari filed by the petitioner herein and is also found on page 52 of the transcript of record. The decision is reported in the official reports as 52 Cal. 2d 769. The dissenting opinion of Mr. Justice Traynor, as Acting Presiding Judge is found on page 12 of the Appendix to the Petition for Writ of

Certiorari and on page 58 of the 1960 Transcript of Record. A second dissenting opinion filed by Mr. Justice Peters is found on page 17 of the Appendix to the Petition for Writ of Certiorari and on page 62 of the 1960 Transcript of Record. Chief Justice Gibson disqualified himself from these proceedings and did not participate in the decision of the Supreme Court of California.[1]

A petition for rehearing was filed with the Supreme Court of the State of California and on November 13, 1959, the petition was denied with Acting Chief Justice Traynor and Justice Peters stating that they were "of the opinion that the petition should be granted."

II.
Jurisdiction.

A petition for a writ of certiorari was filed before this court on January 26, 1960, and certiorari was granted on March 7, 1960.

III.
Constitutional Provisions and Statutes Involved.

1. Constitution of the United States:

a. The First Amendment to the Constitution of the United States provides:

> "Congress shall make no law . . . abridging the freedom of speech, or the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

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[1]Chief Justice Gibson however voted along with Justice Jesse Carter and Justice Traynor for a hearing of this matter when the California Supreme Court denied review on April 20, 1955. See 1956 Record, page 132.

b. The Fourteenth Amendment to the United States Constitution provides:

> ". . . no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (Sec. 1.)

2. The only California Statutes involved are from the Business and Professions Code of the State of California:

a. Section 6060. Qualifications for Applicants.

> "To be certified to the Supreme Court for admission and a license to practice law, a person (must) . . .:
>
> (c) Be of good moral character. . . ."

b. Section 6064.1. One Advocating the Overthrow of Government Not To Be Admitted:

> "No person who advocates the overthrow of the government of the United States or this State by force, violence or other unconstitutional means shall be certified to the Supreme Court for admission and a license to practice law."

3. Rules regulating admission to practice law in California adopted pursuant to the provisions of the State Bar Act (Ch. IV, Div. 3 of the Business and Professions Code) as approved by the Board of Governors

of the State Bar of California, September 8, 1937, as applying to the present case are:

a. "Section 6: In the conduct of investigations and upon the hearing of all matters, the committee, or any subcomittee, having jurisdiction may:

(1) Take herein relevant evidence;

(2) Administer oaths and affirmations;

(3) Compel, by subpoena, the attendance of witnesses and production of relevant books, papers and documents."

b. Rule 10: Moral Character.

"Section 101. Every applicant shall be of good moral character. Investigations in reference to the moral character of applicants may be informal, but shall be thorough, with the object of ascertaining the truth. Neither the hearsay rule, nor any other technical rule of evidence, need be observed; but an applicant shall be advised of any and all information received by the committee adversely bearing on his moral character upon which a denial of recommendation by the committee is based, and he shall be given a reasonable opportunity to rebut or explain the same. The applicant shall have the opportunity of proving that he is possessed of good moral character, of removing any and all reasonable suspicion of moral unfitness, and that he is entitled to the high regard and confidence of the public."

IV.

Questions Presented.

The questions as presented in the Petition for a Writ of Certiorari are the following:

1. Whether the judgment of the court below, upholding the action of the State Bar Committee of Bar Examiners, refusing to certify petitioner to the court for admission to practice law in California and denying petitioner's application for admission to the bar of California, is inconsistent with this court's opinion, findings, judgment and mandate in *Konigsberg v. State of California*, 353 U. S. 252 (1957), with the resultant deprivation of petitioner's liberty and property without due process of law and the denial to him of the equal protection of the laws in violation of the due process and equal-protection provisions of the Fourteenth Amendment to the United States Constitution.

2. Where this court has held that the petitioner successfully met all state requirements, and that a denial of petitioner's application for admission to the bar would be a deprivation of petitioner's liberty and property without due process of law, is it not an arbitrary and capricious act and an abridgement of petitioner's right to pursue his chosen profession and right to the exercise of freedom of speech, press and assembly contrary to the due process provisions of the Fourteenth Amendment to coerce petitioner in subsequent state proceedings on remand to reveal his political affiliations as a newly contrived condition to admission to the bar where in the said subsequent proceedings the State Bar Committee of Bar Exaaniners comes forward with no affirmative for further proof of petitioner's disqualification to

warrant or justify the aforesaid limitation upon petitioner's rights under the Constitution?

3. Where the record before this court in *Konigsberg v. State of California*, 353 U. S. 252 (1957), conclusively established that petitioner was of good moral character and did not advocate the forceful overthrow of Government and that petitioner had fulfilled all requirements affecting the right to pursue his chosen profession, and when on remand the record in subsequent proceedings and brought up to date shows the same good moral character and loyalty, is it not arbitrary and capricious and a deprivation of petitioner's liberty without due process of law and denial to him of the equal protection of the laws in violation of the applicable provisions of the Fourteenth Amendment to refuse to certify petitioner for admission to practice law and deny his application for admission to the bar solely because of petitioner's refusal to reveal his political affiliations?

4. Where the entire record demonstrates that petitioner has declined to reveal his political affiliations solely upon grounds of long held principle and private conscience, is it not a deprivation of petitioner's freedom of speech, press, assembly and conscience, contrary to the due process inhibitions of the Fourteenth Amendment, to deny petitioner admission to the bar solely because of petitioner's conscientious refusal to reveal his political affiliations?

5. Where the entire record reveals that petitioner has met the ordinary requirements for admission to the Bar

and has overwhelmingly established his loyalty and good moral character, is it not arbitrary, unreasonable and capricious and a deprivation of petitioner's liberty and property without due process of law to deny petitioner admission to the bar solely because of his refusal to reveal his political affiliations in the light of the state and national interest in a free and independent bar and the free exercise of speech, press, assembly and private conscience?

6. Where the petitioner has met all statutory requirements for admission to the Bar and has complied with all written and formally promulgated rules of the Committee of Bar Examiners as prerequisites to admission to the Bar and has met every standard established by judicial decision in the State of California relating to admission to the Bar, it is not a denial of pettioner's liberty and property without due process of law and a denial of equal protection of the laws for the petitioner to be denied admission to the Bar on the basis of a "rule" requiring that he answer questions relating to his political affiliations where that "rule" requiring that he answer questions relating to his political affiliations where that "rule" is first announced and tailored to his specific situation at a hearing held seven years after he commenced the study of law and subsequent to the mandate, decision and opinion of the Supreme Court of the United States on the facts of his case?

V.

Factual Background.

Exactly ten years ago in the year 1950 Raphael Konigsberg commenced the study of law after many years of employment as a social worker including a period as Director of Social Services of the City of Hope Sanitarium, in Duarte, California [1956 Rec. pp. 5-6][2] and as a District Director of the State Administration of the State of California. [1956 Rec. p. 6]. Konigsberg also had served with great distinction in the Armed Forces of the United States from October 1942 to October 1946 and achieved the rank of Captain serving as Orientation Officer for the United States 7th Army in Germany, supervising that program for over four hundred thousand troups. [1956 Rec. pp. 6 and 15.]

In 1953, at the age of 42 Konigsberg completed all of the legal requirements established under the laws of the State of California as qualifications for becoming a member of the Bar of the State of California.[3]

In the year of 1953 and in early 1954 a series of hearings was held before the Committee of Bar Examiners ostensibly directed towards determining whether petitioner was of good moral character and whether he

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[2]Since the record in this case is composed of two separate transcripts, the transcript of the record of the hearing which was before this Court in 1956 will be referred to herein as [1956 R. p. .....] and the transcript of the record before the Committee of Bar Examiners commencing in 1957 and before this Court as the transcript of the record for the October Term 1960 will be referred to hereinafter as [1960 R. p. .....].

[3]Business and Professions Code, Section 6060.

advocated the overthrow of the government by force and violence or other unconstitutional means.

At the conclusion of these hearings the Committee of Bar Examiners determined that petitioner Konigsberg had not sustained the burden of proof (1) that he was possessed of the good moral character required by Sec. 6060(c) of the State Bar Act or (2) that you have complied with the provisions of Sec. 6064.1 of said act. [1956 Rec. p. 344.]

The Supreme Court of California after petition by Konigsberg refused to review the decision by the Committee although three members of the court (Chief Justice Gibson and Justices Traynor and Carter) voted for a hearing. Konigsberg then petitioned to this court for a Writ of Certiorari. Certiorari was granted and this Court rendered its decision on May 6, 1957 reversing and remanding the matter for further proceedings not inconsistent with the opinion.

On remand to the Supreme Court of California petitioner filed on June 26, 1957 an application for admission to the practice of law based upon the opinion of this Court in *Konigsberg v. State Bar*, 353 U. S. 252 [1960 Rec. p. 1.]

The Supreme Court of California thereafter vacated its prior order and referred the matter to the Committee of Bar Examiners for further proceedings. Justice Carter recorded that he was of the opinion that "the application of Raphael Konigsberg for admission to practice law in all of the courts of this State should now be granted". [1960 Rec. pp. 2-3.]

On September 21, 1957 the Committee of Bar Examiners then conducted a further hearing.

At this hearing counsel for petitioner requested the Committee of Bar Examiners to immediately recommend favorably to the Supreme Court of California the application for admission of Konigsberg and urged that it would be a denial of due process to proceed with any further proceedings other than to recommend admission. The Committee denied the motion. [1960 Rec. p. 10.]

Petitioner then called on his behalf as a further witness to establish the continuing nature of his good moral character Herbert D. Tobin. [1960 Rec. pp. 11-14.] Tobin testified that Konigsberg had been employed as office manager in connection with his tract building operations for a period of two and one half years. He testified that "I think he is probably the most honest both intellectually as well as legally the most honest man I have ever met. . . . His ethics and his attitudes, his sincerity, his loyalty, is beyond all reproach . . . .he has full power to sign checks on our general account, which at times may have as much as a quarter of a million dollars in it . . ." [1960 Rec. p. 13.]

In response to the question "Have you observed in the course of the two and a half years any indication on the part of Mr. Konigsberg of a belief of the overthrow of the government by force and violence?" Mr. Tobin responded, "No, that is completely childish." [1960 Rec. p. 14.]

The Committee of Bar Examiners was afforded an opportunity to cross-examine Mr. Tobin but declined to ask any questions. [1960 Rec. p. 14.]

Thereafter the Committee proceeded to question Konigsberg personally and the questions did not raise nor

did the committee inquire about any single derogatory fact in the life or activities of Konigsberg since the prior precedings or any other time during his life.

The Committee then asked whether Konigsberg had ever been a member of or affiliated with any organization the purpose of which at the time of your membership or affiliation is, or was, to advocate the overthrow of the constitutional form of government . . . [1960 Rec. p. 19] and whether he "had been a member of the Communist Party at any time since 1951". [1960 Rec. p. 23.]

Konigsberg responded in part that

> "The question, of course, is similar to the question asked me four years ago, though phrased somewhat differently, and while I think we all change somewhat in four years even at this age in our thinking, the basic principles that I established in that case and in those hearings that questions regarding one's political thinking are protected by the First Amendment and have no bearing whatsoever on one's moral character, have, I think, pretty well been determined by the Supreme Court Opinion in my case and certainly having the Supreme Court vindicate my opinion and principles which are now in effect, and in a sense the law of the land because of the Supreme Court Opinion, I could hardly be expected at this point for expediency to give up principles that have been upheld by the highest court of our country. . . . [1960 Rec. pp. 19-20.]
>
> "Now if you were asking me whether I, as a person ever belonged to an organization that ad-

vocated the overthrow of the government by force or violence, according to my knowledge, or whether I personally ever advocated this or ever did anything such as throwing a bomb or writing a leaflet or speaking of advocating the overthrow of the government by force and violence or even whether I ever attended a meeting at which force and violence was proposed as a course of action, the answer is no. I personally have never been a member of an organization which to my knowledge engaged in such advocacy. I never could be or would be. I never did a thing in that direction I made clear in the prior hearings but if you are asking me whether I as a citizen have in the course of normal civic or political duty describe it as you will, because I think the record does make clear that I have a strong civic conscience, if what you mean by your questions did I ever join with people who were known to be members of the Communist Party, if that were the case or if whether I personally joined the Communist Party as a legal political organization in this State, which the Supreme Court, in my opinion, makes clear it was at the time, then I refuse to answer that phase of the question, because this is an area protected by the First Amendment from ages past, and certainly reaffirmed in recent decisions, including my own." [1960 Rec. pp. 20-21.]

Petitioner further stated:

". . . I think the record makes very clear whatever you may think of those principles that I have tried to live a principled life, and that being

the case you can hardly ask me as a matter of conscience or a matter of principle to give up various principles. This would be committing on my part an immoral act. I doubt very much if the Committee intends to take the position that to prove his good moral character an applicant must commit what to him is an immoral act. [1960 Rec. p. 21.]

"I think I will only reaffirm to my knowledge I hav never been a member of such an organization or group, a part of an organization, or however you want to phrase it. I think this would clarify the matter. May I say that I think you are rightly concerned with matters of advocacy of the overthrow of the government, but it seems to me that you had the opportunity in the previous hearings, and you have it now if you have evidence of any illegal acts on my part then they should be brought forward and give me a chance to answer them, and I will be happy to answer them, not proceed on the basis of mere suspicions. If you have acts or evidence of any acts, I ask you now to bring them forward so I can answer them." [1960 Rec. p. 22.]

The Committee Chairman then informed Konigsberg that the Committee had two functions—to "investigate" and to "determine" and stated that they were engaged in the function of investigating matters "which we are charged with the responsibility of determining under the law of the State of California." He stated in part that

"If we, Mr. Konigsberg, at this point had someone who would testify that such and such was not

the case with respect to an answer that you have given, we would feel it encumbent upon us at this time or at another hearing to bring that person before you and have testimony introduced into the record in order that you would have the right to cross-examination through your counsel." [1960 Rec. p. 23.]

The Committee then proceeded to inquire regarding specific activities of petitioner and all these questions were answered directly and unequivocally by Konigsberg. [1960 Rec. pp. 24-26.]

At a later point in the hearing [1960 Rec. p. 32] Mr. McGovern speaking for the Committee suggested that petitioner had taken the position that the Committee could only inquire as to whether he believed in forcible overthrow of the government. Konigsberg responded in part to this

". . . Do you have any evidence of illegal acts? Bring them out, but you haven't done that. . . . It isn't enough for an American to accept the various privileges that that citizenship grants to them there are certain deep responsibilities that go with those privileges, and unfortunately most of us don't know them, don't accept them, and are not taught them. I was, and I have tried to follow it . . . among the duties of a citizen to compensate for the great advantages he gets, it seems to me is to, of course, protect your country when in danger, whether war or other, to try to live as you might say a seven day practicing believer in democracy, not just on some days, and finally to defend the Constitution by refusing to join in any acts which

in any sense weaken it or compromise it. I feel if you persist in asking questions which go into the areas which are protected by the Constitution, that is what you are doing you are compromising constitutional principles. I cannot be a party to it no matter what the price." [1960 Rec. p. 32.]

And finally after a Committee member pointed out that an answer to the question might lead the committee into further areas of investigation Konigsberg responded

"I have tried to answer I never advocated the overthrow of the government or belonged to an organization that advocated the overthrow of the government. I never attended meetings where this was done. I cannot agree that that is all you are doing when you are asking these questions. What you are asking has already been answered. Any further evidence or information that you seek is invading my rights as to opinion or association, and as leaders in a Bar it seems to me you should be among those strengthening these rights along with the trend of decisions to firm up constitutional conduct and get away from non-conformity that plighted the country in recent years." [1960 Rec. pp. 33-34.]

The only other evidence at the hearing was a series of letters presented on behalf of Konigsberg further attesting to his good moral character. [1960 Rec. pp. 39-50.] These communications updated the series of communications introduced at the earlier hearings and were written primarily by persons who had known Konigsberg since the prior decision of the Court. Typical of these communications are such comments as "In our

opinion Mr. Konigsberg is without question an individual of the highest moral character and unimpeachable integrity"[4] . . . and "I have the highest regard for his intelligence, integrity and moral character and believe he will make an exemplary member of the bar."[5] . . . and, "for these reasons I can think of no other person whom I would rather meet as an opponent in a legal matter, or as an associate, and I feel that he will be an exceptional addition to the legal profession in California."[6]

As a final matter at the hearing, Counsel for the petitioner informed the Committee that he was aware that the Committee had made an independent investigation into the character of petitioner and that a Committee Investigator had sought to determine from many sources whether anything derogatory had occurred in the life of Konigsberg. The Chairman of the Committee acknowledged that such an investigation had been made. He stated that, "You may be certain, however, prior to the time any information that is adverse to Mr. Konigsberg is considered by the committee, Mr. Konigsberg and you, as his counsel, will be made aware of that adverse information." [1960 Rec. p. 39.]

The record is devoid of any single fact regarding the character of Konigsberg derogatory in nature nor has

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[4]Rubins, Rossman and Borak, Certified Public Accountants, [1960 R. p. 49].

[5]Harold Koppelnar, M.D. [1960 R. p. 48].

[6]Richard H. Oshman, Attorney at Law, [1960 R. pp. 45-56].

Konigsberg been "made aware" of any such "adverse information"?

VI.
Summary of Argument.

The State of California has established statutory requirements for admission to the Bar. Petitioner was held by this court to have complied with all of these requirements and this court stated that "it is difficult to comprehend why the State Bar Committee rejected a man of Konigsberg's background and character as morally unfit to practice law." Petitioner's moral character remains unchallenged after new hearings by the Committee of Bar Examiners and there is no further evidence indicating belief by petitioner in the overthrow of the government by force or violence or other unconstitutional means.

In view of petitioners compliance with all statutory requirements, it is a denial of due process of law for the respondent to continue to deny petitioner admission to the Bar.

Petitioner continues to take the same principled position taken before the first decision of this court in this matter. To require petitioner to answer the questions asked under all of the background circumstances of this case would be to force him to commit an immoral act and thus disqualify himself from admission to the Bar.

Matters occurring at the first hearings and prior to the opinion of the Court in that case are not repeated here because all of said issues were heretofore disposed of by this court. A summary of these facts however is to be found on pages 8-18 of the Petitioner's Opening Brief in the proceedings before this Court in the October Term of 1956 and in the Transcript of the Proceedings in that matter which is before this Court by reason of the Court Order dated March 7, 1960 [1960 R. p. 72].

There is no law of the State of California, no prior decision of the Supreme Court of California, nor did the Committee of Bar Examiners ever pass a Rule permitting the Committee to deny petitioner admission to the Bar solely because he failed to answer specific questions regarding his political affiliations or associations. The "rule" in this case was one brought into being solely at the hearing for petitioner. "Elemental Fairness" required by due process of law would prohibit the enforcement of such a "rule" against this petitioner after the Supreme Court has already passed on the facts of this case.

Where the Respondent has applied one rule as the basis for denying petitioner admission to the bar and the court has found that this basis was not proper under the constitution, the respondent cannot thereafter commence the same litigation again based upon an entirely new theory without denying petitioner his constitutional rights.

The questions asked of petitioner by the Committee were all questions falling within the protection of the First Amendment of the Constitution. The balance of rights between the individual and the state must be weighed heavier on the side of the individual where there the questions are designed to curtail the independence of the bar.

It is not proper to equate the responsibilities of an employee to his employer with the obligation of an applicant for entrance into the independent profession of the bar. To restrict membership in the Bar by reason of the refusal of an applicant to discuss his political affiliations and associations would be a serious encroachment of the freedom and independence of the bar which is so vital to the preservation of our democracy.

VII.

Argument.

A. Petitioner Has Complied With All Statutory Requirements for Admission to Bar.

1. *The Prior Record Shows Petitioner's Compliance With California Statutory Requirements.*

The Statutes of the State of California relating to the requirements for admission to the practice of law are found exclusively in the Business and Professions Code of the State.[8] Except as these statutes have been interpreted by the Supreme Court of the State of California[9] and by such rules as have been formally promulgated by the Committee of Bar Examiners.[10] These are the sole legal requirements and the only basis for determining who is to be admitted to the practice of law in the State of California

These requirements insofar as they apply to the facts of this case are only two:

1. That an applicant who has qualified from the point of view of education[11] and age must be a person of good moral character and

2. Under the provisions of Sec. 6064.1 must not be a person who advocates the overthrow of the government by force, violence or other unconstitutional means.

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[8]See Business and Professions Code, 6060 and 6064.1.

[9]There are no prior written decisions of the Supreme Court denying an applicant admission to the Bar by reason of applicants political associations or beliefs.

[10]The petitioner has set forth on pages 2-5 the basic rules which apply to this case.

[11]About which there is no dispute in this proceeding.

When this proceeding was before the Supreme Court in the 1956 Term the Committee of Bar Examiners stated that the petitioner Konigsberg had failed to meet his burden of proof that he was of good moral character and did not believe in the overthrow of the government by force and violence.[12]

At that time petitioner argued that he had met his burden of proof in both instances although he argued that under the law the burden of proof on the issue of force and violence did not fall upon him but must be affirmatively proved by the Committee of Bar Examiners. (*Speiser v. Randall*, 357 U. S. 513 (1958).)

This Court found that:

> "After examination of the record, we are compelled to agree with Konigsberg that the evidence does not rationally support the only two grounds upon which the Committee relied in rejecting his application for admission to the California Bar."

and

> "On the record before us it is our judgment that the inferences of bad moral character which the Committee attempted to draw from Konigsberg's refusal to answer questions about his political affiliations and opinions are unwarranted."

and

> "In this case we are compelled to conclude that there is no evidence in the record which rationally justifies the finding that Konigsberg failed to establish his good moral character . . . without some authentic, reliable evidence of unlawful or

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[12]See 1956 Record, page 131.

immoral actions reflecting adversely upon him, it is difficult to comprehend why the State Bar Committee rejected a man of Konigberg's background and character as morally unfit to practice law." (353 U. S. 252, 262, 270-271, 273.)

These findings clearly indicated that Konigsberg had met his burden of proof and had established his good moral character, and that it was a denial of due process to thereafter deny him admission to the practice of law.

Wherein is the posture of the present record any different than the record before the Court in the October 1956 Term of the Court?

2. *Petitioner's Good Moral Character Remains Unchallenged.*

Since the 1957 decision the Committee of Bar Examiners has by its own admission employed an investigator to find any available evidence adverse to petitioner.[13] The Chairman of the Committee conceded that no such evidence was considered in making its determination and that if it obtained any such evidence it would give the petitioner an opportunity to rebut. The record clearly indicates that no such evidence exists.

Under these circumstances the moral character of the petitioner remains in the same status as at the time of the previous decision and opinion of this Court when it was stated that petitioner had met his burden of proof.

[13]1960 Record, pages 38-39.

In addition, however, petitioner has on his own initiative brought that record of good moral character up to date and has shown by letters from lawyers, doctors, certified public accountants and other persons of public stature that he continues to be a person of good moral character.[14] One witness was brought before the Committee to testify personally that he had known petitioner intimately for two and a half years as his employer and had placed in petitioner great trust and responsibility and that he considered petitioner to be a person of the highest moral character and integrity.[15]

The Committee of Bar Examiners had full opportunity to question each and every person who wrote letters on behalf of the petitioner[16] but even if this appeared to be too much effort for the Committee, the members had the opportunity to question the one witness who was brought before the Committee by the petitioner. Yet not one question was asked in cross-examination nor was any effort made to challenge in

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[14]See 1960 Record, pages 39-50.

[15]1960 Record, pages 11-14.

[16]It should be remembered that at the first hearing petitioner introduced letters from 35 persons. Respondent minimized the importance of these letters in its briefs but it is clear that with all of these leads available to it, the Committee and its investigator failed to find any information derogatory to the petitioner. This fact alone makes the argument of "Frustration of its investigation" appear shallow and contrived.

any manner petitioner's showing of his good moral character.[17]

On the state of this record, then, petitioner's good moral character is conclusively established and he has complied with this requirement for admission to the Bar of the State of California.

3. *The Record Continues to Show That Petitioner Does Not Advocate Overthrow of the Government by Force and Violence.*

The second requirement is that petitioner not be a person who believes in the overthrow of the government by force or violence or other unconstitutional means.

Petitioner has responded to the questions of the Committee on this issue[18] and has indicated his profound disagreement with any doctrine or advocacy of overthrow of the government by force and violence or other unconstitutional means. Petitioner has stated that any doctrine of force or violence is inimical to his char-

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[17]This despite the fact that in 1956 the respondent cavalierly dismissed the letters submitted by petitioner at the first hearing by saying that "moreover the doubts with respect to petitioner arose primarily in specific areas such as those relating to the communist party and the failure of any of the letters to indicate an awareness of these areas of doubt materially lessened their value" (Resp. Br. (1956) p. 58, (fn.)). It would appear from this that respondent's sole concern was to force petitioner to subservience rather than to pursue the true facts.

[18]It has been pointed out both before the Court at the 1956 term and in the current petition for Writ of Certiorari that the constitutionality of the Section 6064.1 of the Business and Professions Code of the State of California might well be subject to challenge.

acter and contrary to any views which he has ever expressed publicly or privately.[19] In this connection it is pointed out that Exhibits introduced at the first hearings before the Committee of Bar Examiners and before this Court at the time of the first decision indicated that even in writing in the public press petitioner had at all times expressed abhorrence of any doctrine of force and violence.[20]

On this issue, also, the Committee of Bar Examiners found that petitioner had failed to meet his burden of proof. This Court examined the issue and reached its conclusion that

> "In this case we are compelled to conclude that there is no evidence in the record which rationally justifies the finding that Konigsberg . . . failed to show that he did not advocate forceful overthrow of the government." (353 U. S. 252, 273.)

Wherein has the record changed one iota since this Court made its findings as set forth above?

The only change is one more favorable to Konigsberg. The only evidence introduced establishes even more conclusively his disbelief in and that his fundamental character is contrary to advocacy of any doctrine of overthrow of the government by force and violence or other unconstitutional means. The testimony of the one live witness and the additional letters introduced into the record add additional proof of petitioner's character in this particular. With an additional two years in which to investigate and find a scintilla of evidence to the

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[19] 1960 Record, pages 20-21.

[20] 1956 Record, page 173.

contrary not one shred of new evidence has been introduced against the petitioner." How then is it possible to reach any conclusion other than that the record remains that petitioner has shown that petitioner complies with Section 6064.1 of the Business and Professions Code?

4. *Where Applicant Has Complied Fully With All Statutory Requirements, It Is a Denial of Due Process for Respondent to Deny Him Admission to the Bar.*

The record thus shows conclusively compliance with the only two statutory requirements of the laws of the State of California. There are no decisions of the Courts of the State of California and no Rules of the Committee of Bar Examiners which authorize denial of admission to petitioner where he has so complied."

As Mr. Justice Peters stated in his minority opinion in the California Supreme Court

> ". . . it is the law of this case that the record before the Supreme Court of the United States established, as a matter of law, that applicant without conflict proved that he possessed a good moral character and was a loyal citizen. The present record is even stronger in this respect. It is to be taken as established as a matter of law that applicant possesses such a character and is loyal, the relevancy is that he refused to answer questions as to his political affiliations. That whole thing that mere refusal to answer the questions justified refusing certification, under the circumstances here, necessarily violates the law of the case as established by the High Court."

B. The Requirement That Petitioner Answer Questions Relating to His Political Associations and Affiliations as Applied to the Facts of This Case Is Arbitrary and Capricious and a Denial of Due Process of Law.

It is not essential for a determination of this case that petitioner consider whether under any other circumstances or any other case the unanswered questions put to the petitioner here would or could be relevant.[21]

It is the belief of petitioner that asking the questions propounded by the Committee of Bar Examiners to Konigsberg in this case in the light of the history of the proceedings in this case and on the record of this case was an arbitrary and capricious act on the part of the Committee of Bar Examiners.

The Committee was well aware of and purported to be following the decision and opinion of this Court and knew that a finding of good moral character and non-belief in doctrines of force, violence or unconstitutional actions had already been made by this Court. The Committee well knew that the only way in which action could be taken to deny Konigberg's admission to the Bar was by the presentation of affirmative evidence contrary to these findings and meeting what now became a clear burden of proof on the Committee.[22]

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[21]While petitioner is not required for purposes of determination of the facts of this case to reach a decision on this matter petitioner certainly would not back away from the position asserted before this Court at the previous hearings to the effect that questions relating to an applicant's political beliefs or associations are not relevant to the issue of determining the moral or educational requirements for the practice of law.

[22]See the Dissent of Justice Traynor in this case:

"Whatever its relevancy in a particular context, however, it is an extraordinary variant of the usual inquiry into crime, for the attendant burden of proof upon any one under ques-

The Committee chose, on the contrary, not to present any such evidence[23] but instead sought to avoid the effect of the Court decision by forcing petitioner into a refusal to answer questions which the Committee well knew could not have any proper effect upon their admitting or denying petitioner to the Bar.

Petitioner had taken an honest, forthright, principled, and consistent position in regard to the self-same, identical, questions at the first hearings. This Court had held that his refusal to answer these questions was principled and that this refusal under the circumstances of this case did not provide a basis for refusing admission to the Bar.

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tion poses the immediate threat of prior restraint upon the free speech of all applicants. The possibility of inquiry into their speech, the heavy burden upon them to establish its innocence, and the evil repercussions of inquiry despite innocence, would constrain them to speak their minds so noncommittally that no one could ever mistake their innocuous words for advocacy. This grave danger to freedom of speech could be averted without loss to legitimate investigation by shifting the burden to the examiners. Confronted with a prima facie case, an applicant would then be obliged to rebut it.

"Such a procedure is logically dictated by *Speiser v. Randall*, 357 U. S. 513 [78 S. Ct. 1332, 1352, 2 L. Ed. 2d 1460]. The court there assumed that the state could deny a tax exemption to one whose advocacy of the unlawful overthrow of the government was such that it could be punished as a crime. Mindful of the risks to free speech, however, it took care to hold that the state could not compel the taxpayer to prove his right to an exemption and that therefore an oath as to his innocence of unlawful advocacy could not be required. There may be differences of degree in the public interest in the fitness of the applicants for tax exemption and for admission to the Bar. Even though the state may have more at stake in the latter situation, it is not therefore freer to endanger free speech needlessly."

[23]Obviously no such evidence was or is available and the Committee knew this to be the fact.

This Court had found that there was no statute nor was there any decision of court nor was there any rule of the committee which permitted the arbitrary denial of admission by reason of refusal to answer these questions.

Nevertheless and in the light of these facts and in the light of their foreknowledge that petitioner could not in good moral conscience respond to the questions, the Committee persisted in putting the questions to petitioner and insisting upon an answer.

What alternatives did this action on the part of the Committee place before Konigsberg? What opportunities did it give the Committee?

The Committee informed Konigsberg that if petitioner refused to answer his application would be denyed for that reason alone. Since there was no rule of the committee or statute or decision which permitted this refusal in and of itself, to become a basis for denial of admission to the Bar, the Committee could not properly deny petitioner admission for his refusal to answer alone.

On the other hand if the morally corroding demands of expediency were to convince the petitioner that he should waive his moral principles and respond to the Committee's questions—what then?

The Committee would then have forced petitioner into a position where by their own rules and definitions they would then have had to deny him admission to the Bar also. How could the Committee admit a man to the Bar where by his own admissions he had become an immoral person when he relinquished his moral principles for purposes of expediency and personal gain. Would

such a person be expected to protect the interest of his client without regard to personal or private gain? Thus, the Committee would have forced petitioner into an immoral act and could then have denied him admission to the Bar for having committed this highest of immoral act—the denial of one's own principles for personal gain.

Under these circumstances the very asking of the questions became an arbitrary, capricious act on the part of the Committee and a denial of due process of law insofar as it applied to this petitioner and under the facts of this case. The questions were calculated and designed to deny petitioner admission to the Bar regardless of his response.

C. The Judgment Below Is Inconsistent With the Opinion of This Court.

1. *The Denial of Admission to the Practice of Law for Refusing to Answer These Specific Questions Was Arbitrary and Capricious Since It Was Not Permitted by Any Law, Decision or Rule.*

The Committee of Bar Examiners and the Supreme Court of California below, bases its refusal to admit petitioner on this statement appearing in the decision of the majority of this Court in the 1957 decision:

> "If it were possible for us to say that the Board had barred Konigsberg solely because of his refusal to respond to its inquiry into his political associations and his opinions about matters of public interest, then we would be compelled to decide far-reaching and complex questions relating to freedom of speech, press and assembly. There is

no justification for our straining to reach these difficult problems when the Board itself has not seen fit, at any time, to base its exclusion of Konigsberg on his failure to answer. If and when a state makes failure to answer a question an independent ground for exclusion from the Bar, then this Court, as the cases arise, will have to determine whether the exclusion is constitutionally permissible. We do not mean to intimate any view on that problem here nor do we mean to approve or disapprove Konigsberg's refusal to answer the particular questions asked him." (353 U. S. 252, 261-262.)

The Committee ignored completely the preceding paragraph and in so doing has fallen into the vice which brings this matter before this Court. This paragraph read:

"There is nothing in the California statutes, the California decisions, or even in the rules of the Bar Committee, which has been called to our attention, that suggests the failure to answer a Bar Examiner's inquiry is, ipso facto, a basis for excluding an applicant from the Bar, irrespective of how overwhelming is his showing of good character or loyalty or how flimsy are the suspicions of the Bar Examiners. Serious questions of elemental fairness would be raised if the Committee had excluded Konigsberg simply because he failed to answer questions without first explicity warning him that he could be barred for this reason alone, even though his moral character and loyalty were unimpeachable, and then giving him a chance to comply. In our opinion there is noth-

ing in the record which indicates that the Committee, in a matter of such grave importance to Konigsberg, applied a brand new exclusionary rule to his application—all without telling him that it was doing so." (353 U. S. 252, 260-261.)

There was no statute which permitted denial of Konigberg's petition for admission to the practice of law in the light of his "overwhelming showing of good character and loyalty"; no new statute has been passed since that date and even if it had could not properly be applied to the *Konigsberg* case.[24]

There have been no decisions of the Supreme Court of California prior to the decision of the Court in this case.

There was no formal rule of the Bar Examiners' in effect at the time of the Supreme Court decision and no new rule has been passed since the Supreme Court decision.

All that has happened in this case is that by arbitrary and capricious action the members of the Committee of Bar Examiners declared in an across-the-table conversation with Konigsberg that if he declined to answer the questions they would consider this a sufficient ground for denying him admission to the bar without more. This was simply a matter of committee fiat determined at the moment and without authority or precedent in the law.

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[24]To the contrary the record is very clear that numerous efforts to pass such a statute or even related statutes have failed in the legislature and before the State Bar itself. See Footnote 29 on page 38, *infra*.

Under these circumstances it cannot be said that there is any change whatsoever from the status of the case when it was before this Court in the 1956 term.

2. *Respondent Failed to Follow the Mandate of This Court and in so Doing Denied Petitioner Due Process of Law.*

The Supreme Court of California refused to certify petitioner in 1953 even though petitioner had completed his educational requirements and had satisfactorily passed the California Bar examination. The State Supreme Court without opinion (although three justices dissented) denied the petition for review and it was thereafter that this Court granted certiorari and heard argument as to the constitutional issues raised by this denial.

This Court concluded its opinion by stating that:

> "The judgment of the court below is reversed and case remanded for further proceedings not inconsistent with this opinion".

The only action consistent with this opinion was the admission of Konigsberg to the practice of law in the State of California. Any other action was inconsistent with the opinion and a denial of due process of law and equal protection of the law as to petitioner.

The Court stated the issue in the first *Konigsberg* case clearly and unequivocally:

> "We now pass to the issue which we believe is presented in this case: Does the evidence in the record support any reasonable doubts about Ko-

nigsberg's good character or loyalty to the governments of state and nation?" (*Konigsberg v. State Bar*, 353 U. S. 252.)

This question is then answered clearly in the negative when the Court says:

> "When these items are analyzed, we believe that it cannot rationally be said that they support substantial doubts about Konigsberg's moral fitness to practice law."

And again

> "On the record before us, it is our judgment that the inferences of bad moral character which the Committee attempted to draw from Konigsberg's refusal to answer questions about his political affiliations and opinions are unwarranted."

And then finally the Court concluded that

> "without some authentic reliable evidence of unlawful or immoral actions reflecting adversely upon him, it is difficult to comprehend why the State Bar Committee rejected a man of Konigberg's background and character as morally unfit to practice law." (353 U. S. 252, 266, 270-271, 273.)

The Committee of Bar Examiners in making its report to the Supreme Court of California treated the case as though it were a new case coming before the Committee with an applicant who had no prior record before the Committee and who had not taken his case before the United States Supreme Court. The Committee of Bar Examiners treated the matter as though it was possible to approach Mr. Konigsberg in some kind of an historical vacuum in which the past had

never happened, this Court had never heard the case and a Bar applicant by the name of Konigsberg was in some capricious manner refusing to answer questions of vital importance to the Committee.

It is not for this petitioner to discuss the legal effect of such a hypothetical case because this is not and was not the *Konigsberg* case at the time of the last hearing before the Committee of Bar Examiners.

It has already been pointed out that contrary to the statement of the Committee of Bar Examiners in its report to the Supreme Court the refusal to answer questions by Konigsberg did not constitute an obstruction of the investigation of the Committee but in fact constituted a moral dilemma for Konigsberg wherein any answer that he gave to the question would provide a basis for the Committee to deny him admission to the Bar.

The Supreme Court of California appears to assume that the mandate of this Court was that the Committee of Bar Examiners should simply call Konigsberg back and warn him that his failure to answer questions would in and of itself constitute a basis for denying him admission to the Bar.

But as Mr. Justice Peters in his dissenting opinion in the California Supreme Court said "It is certain the Supreme Court could not have meant that without a statute or rule the Board of Bar Examiners could create a 'rule' simply by warning Konigsberg that the effect of refusal to answer would be to cause the Board to refuse his certification. Such a warning coming four years after Konigsberg first appeared before the Committee does not comply with 'rules of elemental

fairness' as required by the Supreme Court of the United States." (*Konigsberg v. State Bar*, 52 Cal. 2d 769.)

D. The Formulation of a Brand New Exclusionary Rule and Applying It Solely to the Petitioner Herein Constitutes a Denial of Due Process and Equal Protection of the Law.

The Committee and the Court below attempt to predicate their decision on the formulation of some sort of a "rule" which allows denial of admission to the Bar to Konigsberg solely by reason of his refusal to answer questions which they considered to be relevant.

Petitioner has already pointed out that no such rule or statute or law or decision existed or exists in the laws of the State of California but for purposes of this phase of the discussion we shall approach the subject as though the action of the Committee of Bar Examiners could by some fiat be raised to the dignity and stature of a rule.

The Committee of Bar Examiners in 1954 clearly spelled the basis upon which they were denying petitioner admission to the Bar. They stated that he had failed to meet his burden of proof that he was a person of good moral character and that he had failed to meet his burden of proof that he did not advocate the overthrow of the government by force and violence or other unconstitutional means.[25] These were stated as the

[25]The letter from the Committee of Bar Examiners to Konigsberg dated May 17, 1954 read in part:

"It is the Committee's determination that you have not sustained the burden of proof (1) that you are possessed of the good moral character required by Section 6060(c) of the State Bar Act or (2) that you comply with the provisions of Section 6064.1 of Said Act."

basis of their action. The Supreme Court of California refused to review.[26] It thereby approved the basis of the action by the Committee of Bar Examiners.

Any unspoken rule existing today providing for the exclusion of an applicant solely for refusal to answer a material question existed at the time of the previous hearing[27] yet such a "rule" was not set forth as a ground for the denial of the petitioner and in fact the very contrary was true.[28] The Committee of Bar Examiners in the State of California selected its basis for denial. It spelled out that basis in its own decision and in its briefs before this Court. Now and only after this Court passed upon the merits of that basis has the Committee shifted its ground and endeavored to find some other basis upon which to continue to deny petitioner his constitutional rights.

This Court has frequently stated that administrative officials may not exceed their statutory powers or even their own self limiting regulations when dealing with employment of personnel. Thus in *Peters v. Hobby*, 349 U. S. 331, 75 S. Ct. 790 (1955); *Cole v. Young*, 351 U. S. 536, 76 S. Ct. 861 (1956) and *Service*

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[26]April 20, 1955.

[27]The Committee has at no time suggested that any formal rule has ever been promulgated by it either before or since the first Konigsberg hearings.

[28]See the respondent's brief before this Court in the October Term of 1956 where the entire document is predicated on the fact that petitioner had failed to meet his burden of proof and that he was being rejected on the basis of evidence presented which raised inferences of bad character. See particularly Section F of the respondent's brief, pages 41-55, where Respondent relies on matters found in the record of the first hearing which this Court held to be inadequate grounds.

v. *Dulles*, 354 U. S. 363, 77 S. Ct. 1152 (1957), this Court held that the government officials had exceeded their own defined authority.

This attack upon the constitutional rights of the petitioner is the more serious where it takes place after judicial determination that the first basis for the exclusion of the petitioner was unconstitutional.

As Mr. Justice Peters stated in his dissenting opinion before the California Supreme Court

> "How many times does the issue of whether applicant possesses a good moral character and is a loyal citizen have to be tried? Those were the issues presented. Having sustained his burden as to those issues, on what rational theory can it be held that the State Bar, at this late date, with no new evidence, can offer a new and different excuse for denying certification? When does this litigation come to an end? I had always thought, until I read the majority opinion in this case, that our system of law was predicated on the fundamental theory that, when issues were between litigants have once been determined, they cannot be relitigated. I had always thought that litigants were required to raise all relevant issues in one proceeding. I had assumed that parties cannot litigate their case piecemeal."

In this situation it would appear that the Committee of Bar Examiners has carefully tailored a rule and formulated it for the first time in a manner designed and calculated to deprive this particular petitioner of his constitutional right to practice the profession of his own choosing. Such a rule if indeed it is a rule has

all of the earmarks of a bill attainder (See *United States v. Lovett*, 328 U. S. 303, 66 S. Ct. 1073 (1946)).

How else can such a rule be interpreted when concededly it has never existed before this Court's decision and where it is utilized solely for the purpose of avoiding the effect of the decision of this Court in this particular case.[29]

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[29]It should be noted in this connection that the legislative history of bills attempting to accomplish by legislation what the Committee of Bar Examiners here has endeavored to do by retroactive rule would indicate that the acts of the Committee are contrary to the legislative intent of the State of California.

In 1949, Senator Jack Tenney introduced Senate Bill 298 proposing a loyalty oath for lawyers and applicants for the Bar and proposed that investigations of loyalty based upon the files of the Attorney General and investigating committees among other things be utilized in determining the loyalty of lawyers and applicants. This bill was opposed by the Board of Bar Governors of the State Bar of the State of California and representatives from the State Bar appeared before the legislature and at least in part as a result of such appearance the bill was not passed by the State legislature.

In 1954 a bill was introduced by Senator Burns, successor to Senator Tenney as Chairman of the Senate Committee on UnAmerican Activities. Senate Bill 1666 would have required attorneys to disclose connection with organizations which advocate the forceful overthrow of the government. It was in this session of the Legislature that Section 6064.1 of the Business and Professions Code was passed.

In 1955 further amendments to the Business and Professions Code were proposed to the State Bar of California providing for discipline of attorneys in the event of advocacy of forceful overthrow of the government or membership in an organization which so advocated and including provisions for punishment of

E. It Is Arbitrary, Unreasonable, Capricious and a Denial of Petitioner's Liberty and Property Without Due Process of Law to Deny Him Admission to the Bar Solely Because of His Refusal to Reveal His Political Affiliations.

1. *The Questions Asked Fall Within the Constitutionally protected Area of Freedom of Speech, Press and Association.*

It is clear that states through their properly constituted agencies such as their Committee of Bar Examiners have the right to protect citizens of the state from unethical and unskilled attorneys and to establish proper rules and regulations to exclude incompetent persons or unprincipled persons from the Bar.

In California persons have been denied admission to the Bar for proof of commission of acts involving moral

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attorneys who refused to answer questions relating to membership in organizations of the nature referred to above. Hearings were held formally in Los Angeles and San Francisco on these proposals. Over 1100 lawyers within the State of California formally notified the State Bar of their opposition to these proposals and the Board of Governors of the State Bar of California rejected all portions of these recommendations which could have had the effect of requiring answers from lawyers pertaining to association with particular organizations. Even the limited portion of the original proposal which eventually became Assembly Bill 1800 in the 1955 State legislative session was defeated by the State Legislature.

Thus it is clear that every effort to incorporate into law in California the purported rule which the Committee of Bar Examiners has utilized as a basis for denying admission to the Bar to the petitioner has been defeated either by the Board of Bar Governors of the State Bar of California or by the State Legislature.

turpitude and bearing directly on their competence as attorneys or for deficiencies in their moral principles.[30]

In the first *Konigsberg* case before this Court the State of California asserted that writings of the petitioner of a political nature and alleged associations of the petitioner were sufficient to allow the State to draw the conclusion that petitioner had not met his burden of proof that he was of good moral character and did not advocate the overthrow of the government by force and violence or other unconstitutional means.

The respondent now appears ambivalent in its approach to the case. Respondent argues that the only reason why petitioner is being excluded is because he has declined to answer relevant questions put to him by the Committee. Yet respondent discloses its own dilemma in the "brief in opposition to the petition for writ of certiorari" and in the argument of this case before the Supreme Court of the State of California when it utilizes the same information and makes the same inferences from the evidence presented in the first

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[30]Thus in *In re Garland*, 219 Cal. 661, 28 P. 2d 354 the petitioner was a convicted forger; in *In re Wells*, 174 Cal. 467, 163 Pac. 367 the petitioner was guilty of committing a fraud upon the court in a prior proceeding; in *In re Hovey*, 7 Cal. Unrep. 203, 81 Pac. 1019, disbarment proceedings involving commission of a crime had been instituted against the applicant in another state; In *Spear v. State Bar of California*, 211 Cal. 183, 294 Pac. 697, the applicant made false affidavits accompanying his application. There is no reported case in California in which the applicant was denied admission by reason of his political associations or affiliations or his refusal to answer questions regarding such associations or affiliations.

hearing as a basis for establishing the releyance of the questions which petitioner declined to answer.[31]

Yet only by utilizing these inferences could the committee find a basis for its contention that the questions asked were relevant.

It is true that when a man is denied admission to the Bar of a State because of fraudulent actions in the past or because of some unprincipled acts or falsification of statements before the Committee of Bar Examiners, he is being denied the right to practice the profession of his own choosing. But in such case this denial is based upon specific acts on the part of the petitioner and these specific acts directly relate to the requirements of the practice of law.

In the instant case the denial to petitioner is based not upon any acts whatsoever[32] but is based upon his failure to answer questions relating to his political beliefs, associations or membership.

There can be no question that one of the inalienable rights of a citizen is the right to practice a profession of his own choosing. "The theory upon which our

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[31]To understand this ambivalent position of the State Bar one need only read pages 30 to 36 of the transcript of the oral argument before the Supreme Court of California in which counsel for the State Bar read at great length from the selfsame articles introduced at the first hearing wherein this Court held that "We do not believe that an inference of bad moral character can rationally be drawn from these editorials."

[32]Except insofar as the Committee of Bar Examiners is in fact denying him admission now for the selfsame reasons they denied him admission in 1953 but are assigning different reasons in order to avoid the effect of the courts prior defusion.

political institutions rest, is that all men have certain inalienable rights—that among these are life, liberty and the pursuit of happiness; and that in the pursuit of happiness all avocations, all honors, all positions, are alike open to everyone, and that in the protection of these rights, all are equal before the law". (*Cummings v. Missouri*, 4 (Wall.) U. S. 277, 321).[33]

In addition we are here dealing with questions involving freedoms protected by the First Amendment to the Constitution which have a "preferred place . . . in our scheme (of government) . . . not permitting dubious intrusions'" (*Thomas v. Collins*, 323 U. S. 516, 529).

This Court has frequently weighed in the balance restrictions on the fundamental right of freedom of speech and press and assemblage against the importance or value to the State in particular area in which it proposes to restrict these rights.

Only in the prior *Konigsberg* case and in the case of *Schware v. Board of Bar Examiners of State of New Mexico*[34] have these relative values of the State against the rights of the individual prospective lawyer been so weighed. In both of these cases this court properly found that restrictions on freedom of expression had been improperly applied in the State below. It should be noted at this point that not only are we in the highly sensitive field of possible infringement on the

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[33]See also *Truax v. Raich*, 239 U. S. 33, 38; *Yick Wo v. Hopkins*, 118 U. S. 356, 370; *Allgeyer v. Louisiana*, 165 U. S. 578, 589; *Smith v. Texas*, 233 U. S. 630, 636; *Mayer v. Nebraska*, 262 U. S. 390, 399; *Takahashi v. Fish Commission*, 334 U. S. 410.

[34]353 U. S. 232 (1957).

First Amendment Constitutional rights of the petitioner but we have entered this field by the thin thread an inference and an even thinner thread of failure to answer questions the relevency of which is predicated on that same inference.

It is true that petitioner has a legal burden of proof and in the normal case must carry that burden forward. But in the present case this very court has said that petitioner has met every burden of proof placed upon him by the decisions, statutes or rules of the State of California. Respondent now comes forward and at this late stage asks questions without introducing any evidence of wrongdoing or any other evidence justifying the asking of the questions which fall within the critical area of the First Amendment. Certainly under these circumstances the balance of the State's interest as against the interest of the individual must be resolved on the side of the individual.[35]

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[35]See testimony of Professor Thomas I. Emerson of Yale University Law School in the contempt trial of one Edward Yellin at Hammond, Indiana on March 10, 1960 quoted in full in 20 *Lawyers Guild Review*, 41, 49 (1960), where he says:

"For instance, in my classes, both in constitutional law, in connection with the Konigsberg case, and in political and Civil rights, there has been discussion as to whether members of the Communist Party should be allowed to be members of the bar. I know from the discussion in class, which I think is reasonably open, what the views of the various members of the class on this may be. The majority of them, rather large majority, have at least stated the position, and I think it is their correct position, that whether a lawyer is a member of the bar should not depend upon whether he is a member of the Communist Party but upon the qualifications, the merits. When, however, the students were called before the character committee for admission to the bar they were asked the question, in many instances, as to whether or not they believed a member of the Communist

This is particularly true because we are dealing in an area particularly sensitive because it involves the independence of the Bar.

Mr. Justice Black in this very case made this point clear when he pointed out that

> "We recognize the importance of leaving states free to select their own Bars, but it is equally important that the state not exercise this power in an arbitrary or discriminatory manner nor in such a way as to impinge on the freedom of political expression or association. A Bar composed of lawyers of good character is a worthy objective but it is unnecessary to sacrifice vital freedosm in order to obtain that goal. It is also important both to society and the Bar itself that lawyers be unintimidated—free to think, speak and act . . ."[38] (353 U. S. 252, 273.)

It seems clear that the apparent rights of the State upon which the Committee seeks to rest its intrusion

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Party should be a member of the bar. Many of them, contrary to the view that they had expressed privately, expressed the view that a Communist should not be admitted to the bar. That I think is an indication of the most unfortunate consequences of an attitude of the most unfortunate consequences of an attitude for which I think the legislative committees are very largely responsible.

"It seems to me a very poor way for a person to enter the legal profession, by being forced to conceal his views on peril of knowing that he will be in difficulties if he does not. And it is that kind of an impact, as well as the impact of being noncommitted and unwilling to participate in the solution of significant problems that I think is quite widespread as the result of inquisitions, or investigations, pardon me, of legislative committees."

[38]See for further discussion of this point the petitioner's discussion in connection with the *Beilan* and *Lerner* cases.

into the personal views, beliefs and associations of the petitioner is predicated upon the assumption that the answers to the questions asked might lead the Committee to some information about petitioner which could ultimately lead them to the conclusion that he advocates the overthrow of the government by force and violence.

The petitioner however has never once refused to answer the questions directed to the ultimate fact which the Committee must decide. Time and time again petitioner informed the Committee that he would answer any questions regarding facts which indicated that he had such belief or advocacy. He promised to answer any question relating to specific facts but the Committee brought forward no such facts[37] nor asked any questions indicating the existence of any such facts. This court has pointed out that simple membership in the Communist Party without scienter could not become the basis for punitive actions against individuals.[38]

Yet here the accusation of past membership in the Communist Party was made on the slimmest of evidence which this Court has found did not provide a sufficient basis for a finding that petitioner had not met his burden of proof that he had good moral character. That same testimony clearly indicated that petitioner had not been involved in any acts of force and violence. What therefore could the respondent gain by asking

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[37] Although required by their own rules and the statement of their own counsel that they would do so if they had any such facts.

[38] *Wieman v. Updegraf*, 344 U. S. 183; *Slochower v. Board of Higher Education*, 350 U. S. 551.

the same questions which petitioner had on high moral principles declined to answer at the previous hearing? The answers to the questions could avail the committee nothing unless they had additional evidence upon which to predicate their subsequent denial of admission to the Bar. Even had the petitioner answered the questions at issue in the affirmative it would have still been necessary for the respondent to establish scienter in order to deny him admission to the bar.[39] Petitioner denied that he had ever participated in any acts involving force and violence or that he had belonged to any organization which advocated or participated in any such acts. This denial constituted a denial of the ultimate facts which the respondent must prove in order to justify a denial of admission. Since petitioner denied that he knew of any such acts or that he had participated in any such acts, only by bringing forward evidence of such acts would the respondent have been in a position to proceed further against him and in this area petitioner always indicated his willingness to cooperate to the complete satisfaction of the Committee but the Committee did not bring forward any evidence because no such evidence existed.

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[39]Respondent concedes in its "brief in opposition to petition for writ of certiorari" that simple past membership in the Communist Party was not a sufficient basis to deny admission to the Bar of California. Note also in Exhibit B that the same Committee of Bar Examiners had admitted a petitioner who conceded that he had previously been a member of the Communist Party.

2. *Decisions of This Court in the Beilan and Lerner Cases Are Distinguishable.*

Without discussing the validity of the position of the majority of this court in the cases of *Beilan v. Board of Public Education*, 357 U. S. 468, and *Lerner v. Casey*, 357 U. S. 468, petitioner asserts that these cases are distinguishable from the *Konigsberg* case.

It is basically the position of petitioner that the only decision which governs the facts of the *Konigsberg* case is *Konigsberg v. State Bar*, 353 U. S. 252, and that the facts of the present case differ in no degree from the facts presented to this court in the 1956 term.

In the *Beilan* case, however, Mr. Justice Burton pointed out that the Pennsylvania Supreme Court had previously held that "incompetency" included "deliberate and insubordinate refusal to answer the questions of his administrative superior in a vitally important matter pertaining to his fitness." Thus, the court was not drawing any inferences from the refusal to answer but merely equating refusal to answer with incompetency as previously determined by the courts of Pennsylvania. Similarly, in the *Lerner* case the determination to discharge the plaintiff for his failure to answer questions was predicated on a statute which permitted a finding of "lack of candor" to be equated with "doubtful trust and reliability."

Konigsberg relied solely on his right to be free from questions regarding his political affiliations and asso-

ciations under the first amendment to the constitution. This court held that his position in this connection was not frivolous and there was no showing that it was not based upon high principle. Nothing in the record of the subsequent proceedings changes this conclusion in the slightest.[40]

Both Beilan and Lerner were employees of governmental agencies. The standard to be applied in both of these cases was a standard established for master-servant or employer-employee relationship.[41]

No employer-employee relationship exists between the State of California or the State Bar of California and an applicant for admission to the independent practice of law. Nothing could be more corroding to our society than a situation in which the lawyer became beholden to the State in the same manner that an employee must be beholden to his employer.

Of all of the professions existent within our society, no profession has a greater requirement for independence and a greater need to avoid the relationship of master-servant with the State or any agency of the State. One of the primary responsibilities of the lawyer is to protect the rights of the individual from encroachment by the State, and by the same token it is

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[40]It should be noted in this connection that both Beilan and Lerner relied principally upon the protections of the Fifth Amendment.

[41]In the brief filed by appellee Casey in the *Lerner* case before this court, the writer distinguished the *Konigsberg* case from the *Lerner v. Casey* case by pointing out that no "employer-employee" relationship existed in the *Konigsberg* case and that this provided a distinguishing characteristic from the *Lerner v. Casey* situation (see appellee's brief before this court dated February 24, 1958 at page 19).

the lawyer who must protect the State against encroachments on society by the individual. Only by remaining free and independent can the legal profession properly and adequately perform this vital function in the working of our democracy. If for one moment we allow the attitude to prevail that the lawyer is simply an employee of the State, or the servant of the State, from that moment onward the citizens of our society will have lost their most precious advocate and protector—the independent lawyer.

The holdings with regard to an employee-subway worker and or an employee-teacher cannot be equated with or become authority for a ruling in connection with an applicant for a license to enter a free and independent profession.

Beilan and *Lerner* are further distinguished from the *Konigsberg* case in that in this case the petitioner refused to answer questions which were propounded to him only after he had established the basic facts which he was called upon to answer under the law: (1) That he was of good moral character and (2) that he did not advocate or believe in the overthrow of the government by force or violence or other unconstitutional means.

In both *Beilan* and *Lerner* the questions were asked for the first time under circumstances which this court, at least, held indicated that the law of the State involved required a response to the questions. In the *Konigsberg* case this court had already held that there was no justification in the laws or the statutes or the decisions of the State of California requiring Konigsberg to respond to the questions under penalty of being denied admission to the Bar if he failed to so re-

spond. Thus, in *Beilan* and *Lerner* the questions were apparently asked in a timely manner and in accordance with the laws of the State involved in each case. In *Konigsberg* the questions were asked only after a Supreme Court decision, and at a time when "elemental fairness" required that the State admit Konigsberg without further questions.

It is clear, therefore, that in addition to the basic principles involved in the freedom and the rights of the lawyer, we find that these cases are distinguishable by reason of the court's interpretation of the laws of the State involved.[42]

When one places in balance the need for a free and independent Bar composed of persons of high moral principle, and dedicated to the preservation of those principles without concern for the benefits or gains of actions based on the expediency of the moment, it becomes clear that the interest of the State of California in securing answers to the questions propounded to Konigsberg becomes of little importance in the scales, and that the *Konigsberg* case is clearly distinguishable from prior decisions of this court in which the scales have been balanced in a contrary manner.

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[42]The *Barenblatt* case (*Barenblatt v. United States*, 360 U. S. 128) is also sometimes referred to as authority contrary to the position taken by Konigsberg. The *Barenblatt* case, however, deals solely with congressional powers and the rights of congressional investigating committees to inquire into matters which are of legislative import. Since we are in no wise concerned with the legislative process in the *Konigsberg* case, it is clear that the holding in Barenblatt cannot be used as authority to deny Konigsberg admission to the Bar based on the facts of this case.

VIII.

Conclusion.

For these reasons the judgment of the Court below should be reversed and upon this record the Petitioner should be adjudged entitled to Admission to the Bar of the State of California.

Respectfully submitted,

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SAM. ROSENWEIN,

Of Counsel.

Dated: August 19, 1960.